No. 20,771

In the

United States Court of Appeals

for the Ninth Circuit

SAYRE & COMPANY, LTD.,
Appellant,

vs.

A. G. MADDOX,
Appellee.

Appellant's Reply Brief

On Appeal from the District Court of Guam

BARRETT, FERENZ & TRAPP
W. SCOTT BARRETT
Penthouse - 1924 Broadway
Oakland, California 94612
Attorneys for Appellant

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

No. 20,771

In the

United States Court of Appeals

for the Ninth Circuit

SAYRE & COMPANY, LTD.,	*Appellant,*
vs.	
A. G. MADDOX,	*Appellee.*

Appellant's Reply Brief

On Appeal from the District Court of Guam

ARGUMENT

I. A Corporation Organized Under the Laws of Any State or Territory Is a "Domestic" Corporation.

Appellee contends that § 881(a) of the Internal Revenue Code authorizes Guam to tax appellant as a nonresident foreign corporation. This contention is seriously made even though appellee had unsuccessfully made the same contention previously in a similar case. In *Atkins, Kroll (Guam) Ltd., v. Government of Guam,* 367 F.2d 127 (9th Cir. 1966), the court held that the District Court of Guam erred in concluding that Atkins, Kroll, a California corporation, was a foreign corporation under Guam tax law. In reaching that

conclusion, the court reasoned that § 881(a) does not make a corporation defined as domestic under § 7701 of the Internal Revenue Code a foreign corporation as to Guam because a manifest and substantial inequity would result from such a conclusion.

II. Guam Has No Special Tax Privileges Not Available to States.

The Government of Guam argues that failing to allow deductions and imposing the straight 30% tax on income derived from Guam does not constitute a burden on interstate commerce. No authority is cited for that statement, nor is there any. The United States may impose a 30% tax on a foreign corporation as the commerce clause of the Constitution is inapplicable to the federal government. However, Guam, nor any state or possession, may not impose a discriminatory tax on a non-local domestic corporation. The logical conclusion of such a contention would be that any state or territory in the union could impose a flat 30% income tax on all corporations, not organized in or doing business in that state, against all income derived from the state. Such a conclusion has never been reached even by the courts. In fact, Congress has, by virtue of § 381, Title 15, United States Code, very severely restricted the rights of the states to tax income from interstate commerce. § 381 shows a clear Congressional intent to permit state taxation only when the corporation or person taxed has specified business activities within the taxing state. Although § 381 did not become law until 1959, it is a stipulated fact in the instant case that appellant had no contact whatsoever with Guam during the years in question and certainly was not doing business there in any way. Therefore, if it is a domestic, though non-Guam corporation, it is not subject to the provisions of § 881(a) of the Internal Revenue Code.

III. Appellant Cannot Be Taxed at All by Guam Since There Is No Business Activity or Domicile of Appellant in Guam.

Guam has no special privilege to tax as contended by appellee. Guam has no "special status" and no authority is cited by appellee to support that contention. To hold otherwise would be to give Guam the unlimited power to require income tax on all income derived from Guam by any person or corporation, whether domestic in the United States or foreign. This would mean that a company such as Montgomery Wards would have to pay income tax on income derived from sales in Guam transacted entirely by mail. This is carrying the power of a state or territory to tax to the point of the ridiculous.

It is well settled that the power to levy an income tax against a foreign corporation by a state is contingent on the foreign corporation engaging in some business activity in the taxing state. *Spector Motor Service Inc. v. O'Conner,* 340 U.S. 602, 95 L.Ed. 573 (1951).

IV. The Status of Appellant Corporation Is a Question of Law.

Appellee argues that no express objection was made by counsel to the holding by the court that the appellant was a foreign corporation. Since it was admitted and not contested that appellant was a corporation incorporated in the State of Hawaii, its status under the Internal Revenue Code as applied to Guam is a question of law. Also, it appears from the record (R.T. 51) that the court apparently thought it was applying the tax against Kirby Company in Guam on profits made by the Kirby Company. The Court said:

> "But the fact remains that Kirby and Company did make profits in Guam; that money was received over and above expenses in adequate amounts to pay Sayre, Honolulu; that Sayre said it had been paid, either in money or in kind, to the Federal Government, and that

> under the local law, this being a separate territorial tax set up by the United States Congress, the local government is entitled to collect an income tax on non-exempt funds received by a corporation in Guam. Therefore, the court finds in favor of the defendant and against the plaintiff."

From the foregoing, it would appear that the court was making a finding that Kirby and Company of Guam should never have made the payments to Sayre as deductible business expenses. The record does not justify such an assumption.

Dated at Oakland, California, February 21, 1967.

BARRETT, FERENZ & TRAPP
W. SCOTT BARRETT
Attorneys for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

W. SCOTT BARRETT
Attorney for Appellant